



After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be modified to an award for 10 percent disability based on functional impairment.

### **Findings of Fact**

1. On September 12, 1994, claimant injured her back when she slipped and fell while working as a cook for respondent.

2. Claimant received authorized treatment first with her chiropractor, Jerome F. Mangel, D.C., then with Dr. S. V. Vaidya. Dr. Vaidya took claimant off work October 11, 1994. At the request of the insurance carrier, claimant next saw Dr. Eustaquio O. Abay, II, a neurosurgeon. Dr. Abay referred claimant to Dr. Perlita Odulio, a physiatrist.

3. Dr. Odulio first saw claimant on December 16, 1994. Dr. Odulio diagnosed disc disease, low back, and trochanteric bursitis, bilateral. An MRI revealed degenerative changes with posterolateral herniation at the L2-3 level on the right and lateral disc protrusion of L4-5 and L5-S1 which was not impinging the nerve root or spinal canal. Dr. Odulio testified that the disc disease was causing the back pain. When asked about the relationship between the accidental injury and the disc disease, she testified: "I don't have any feeling at that time that the injury aggravated her back problem."

Dr. Odulio did recommend restrictions and rated claimant's impairment. She recommended claimant not sit over 30 minutes, not stand over 10 to 15 minutes, can walk about 150 feet with a cane, should not lift over 15 pounds occasionally, and should not be doing any twisting, bending, squatting, or stooping. She should have frequent stretch breaks, at least every hour. She gave claimant a 7 percent impairment of the whole person based on a nonoperated back.

Dr. Odulio reviewed a list prepared by Mr. James T. Molski of the tasks claimant had performed in her work during the 15 years before the accident. Dr. Odulio concluded claimant cannot do 17 of the 20, or 85 percent, of the tasks.

Dr. Odulio released claimant to return to work with restrictions as of May 25, 1995.

4. Claimant applied to return to respondent but was told there were no openings. Claimant applied for, and is receiving, social security disability and has not, except for the single application with respondent, applied for work since May 1995.

5. Based on testimony by Ms. Karen C. Terrill, the Board finds claimant has the ability to earn \$210 per week.

6. Claimant was examined and evaluated by Dr. Pedro A. Murati on September 22, 1997. He diagnosed right lumbosacral strain with two herniated discs. In response to a

hypothetical question describing the history, he testified that claimant's injury is secondary to the fall at work. He rated the impairment as 14 percent of the body and recommended she be limited to sedentary work. Specifically, he recommended a maximum lift of 10 pounds occasionally, 5 pounds frequently, and 0 pounds constantly. He indicated she could engage in occasional sitting, standing, walking, climbing stairs/ladders, driving, repetitive foot and hand controls and repetitive grasping, but no bending, squatting, or crawling, and said she should alternate sitting, standing, and walking. Based on Mr. Molski's list of tasks, he opined claimant is unable to do 7 of 11, or 64 percent, of the tasks she did in the fifteen years of work before the accident.

7. Claimant saw Dr. Paul D. Lesko at the request of respondent's attorney. He diagnosed back pain secondary to diskitis at multiple levels and trochanteric bursitis. He testified that a great deal of the symptomatology was from age, weight, and generalized wear and tear. He did not relate the symptoms specifically to her injury at work. He rated her impairment as 7 to 8 percent and described 80 to 90 percent of that as preexisting. According to Dr. Lesko, the September 1994 accident was an exacerbation of an ongoing process. He recommended restrictions of no lifting or twisting below upper thigh level with a 15-pound weight restriction. He testified there is some work she is capable of doing or at least attempting. He reviewed a list of tasks prepared by Ms. Terrill and, of the total 23 tasks, agreed that she can do 12 tasks, cannot do 7 tasks, and he was uncertain whether she could or could not do 4 of the tasks.

### Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).

2. K.S.A. 44-510e(a) defines work disability as the average of the wage loss and task loss:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

3. The wage prong of the work disability calculation is based on the actual wage loss only if claimant has shown good faith in efforts at obtaining or retaining employment after the injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If the claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. *Foullk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995). Even if no work is offered, claimant must show that he/she made a good faith

effort to find employment. If the claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn. *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

4. While claimant has severe work restrictions, the Board, nevertheless, concludes claimant would be able to engage in substantial gainful employment. The Board acknowledges Mr. Molski's testimony to the contrary, but from the record as a whole concludes claimant is not totally disabled.

5. The Board finds claimant has not made a good faith effort to find employment since her injury. The record reflects a single application, the application to be reemployed by respondent.

6. Because claimant has not made good faith effort to find employment, the Board must impute a wage. *Copeland v. Johnson Group, Inc.* Based on testimony of Ms. Terrill, the Board imputes a wage of \$210 per week.

7. The imputed wage of \$210 per week is more than 90 percent of the stipulated average weekly wage of \$212.51, and claimant is, therefore, limited to an award based on a functional impairment. K.S.A. 44-510e.

8. Based on the testimony of Dr. Murati and Dr. Lesko, the Board finds claimant has a functional impairment of 10 percent to the body as a whole.

9. The Board finds there should not be a deduction for preexisting disability. K.S.A. 44-501 provides that the disability awarded must be reduced by the extent of any preexisting functional impairment:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

But in this case, the Board concludes the evidence does not establish the extent of preexisting disability. Dr. Lesko has testified that 80 to 90 percent of the current disability is due to a preexisting condition. Claimant argues, and the Board agrees, Dr. Lesko's testimony is different from, and does not equate to, testimony that claimant had a specific percentage of impairment before this accident. Obviously, the 80 to 90 percent can be applied to the current impairment but the contribution from a preexisting condition can be from an asymptomatic condition which does not constitute an impairment. For that reason, the Board concludes the testimony of Dr. Lesko does not answer the question to be answered under K.S.A. 44-510a and there should not be a deduction for preexisting impairment.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark on March 3, 1998, should be, and the same is hereby, modified.

**WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Rebecca Mae Sivils, and against the respondent, Servicemaster Company, and its insurance carrier, Home Insurance Company, for an accidental injury which occurred September 12, 1994, and based upon an average weekly wage of \$212.51, for 35.94 weeks of temporary total disability compensation at the rate of \$141.68 per week or \$5,091.98, followed by 39.41 weeks at the rate of \$141.68 per week or \$5,583.61 for a 10% permanent partial disability, making a total award of \$10,675.59, which is all presently due and owing less amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 1998.

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BOARD MEMBER

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BOARD MEMBER

**DISSENT**

I respectfully disagree with the majority's decision. According to Dr. Odulio, one of the treating physicians, Ms. Sivils should observe the following restrictions:

. . . sitting of not over 30 minutes, standing of not over 10-15 minutes. She can walk for about 150 feet with a cane. She should not lift over 15 lbs

occasionally. There should be no twisting, bending, squatting or stooping. She should have frequent stretch breaks, at least every hour.

Because of those restrictions, vocational rehabilitation expert James T. Molski believes that Ms. Sivils is realistically unemployable. I agree.

The majority has lost sight of the facts that Ms. Sivils is 63 years old and has both limited education and limited work experience.

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BOARD MEMBER

c: E.L. Lee Kinch, Wichita, KS  
Gregory D. Worth, Lenexa, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director